UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
CIVIL FILE NO. 01-709

United States of America,
Ex Rel. Dale Thomas Vosika
and Rob Thompson,

Plaintiffs,

vs.

Starkey Laboratories, Inc.,

Defendant.

Case No. 01-709 DWF/SRN

RULE 26(f) REPORT

The counsel for the parties identified below participated in the meeting required by Fed. R. Civ. P. 26(f) on October 8, 2004, and prepared the following report.

The pretrial conference in this matter is scheduled for November 4, 2004 at 2:00 before United States Magistrate Judge Susan Richard Nelson in Chambers at 242 U.S. Courthouse, 316 North Robert Street, St. Paul, Minnesota. The parties do not request that the pretrial conference be held by telephone.

1. Date and Place of the Meeting: Identification of the Parties and Their Attorneys; Agenda of Matters for Pretrial Conference

a. The date and place at which the meeting was held:

The meeting took place on October 8, 2004, at the offices of Halleland Lewis Nilan Sipkins & Johnson located at 600 U.S. Bank Plaza South, 220 South Sixth Street, Minneapolis, MN 55402-4501.

b. Name, address and occupation or business of each party, together with the name, address and telephone number of the attorneys who represented each party at the meeting:

Plaintiffs:

Dale Vosika
1418 Division Street, Hopkins, MN 55343
(952) 933-6869
Self-employed

Rob Thompson
1901 Cardinal Drive, Shakopee, MN 55379
telephone number unknown
Employed by Starkey

Plaintiffs' Attorney:

Robert J. Hajek
Warchold, Berndt & Hajek
3433 Broadway Street Northeast, Suite 110
Minneapolis, MN 55413
612-331-4211

Defendant:

Starkey Laboratories, Inc.
6700 Washington Avenue South
Eden Prairie, MN 55344-3405
952-941-6401
Business: Hearing aid manufacturing and sales

Defendant's Attorney:

Janice M. Symchych
Bradley J. Betlach
Cynthia P. Arends
Nicole J. Druckrey
Halleland Lewis Nilan Sipkins & Johnson
600 U.S. Bank Plaza South
220 South Sixth Street
Minneapolis, MN 55402-4501
612-338-1838

c. Name of insurance carriers that may be liable for the defense or payment of any damage award:

Starkey is currently investigating whether there is an insurance carrier who may be liable for the defense or payment of any damage award.

d. An agenda of matters to be discussed at the Pretrial Conference:

Scheduling.

2. Description of the Case

a. A concise statement of the jurisdictional basis of the case, giving statutory citation and a brief narrative description:

This is a claim under the Federal False Claims Act, 31 U.S.C. § 3729-3733 alleging that Starkey knowingly submitted false and fraudulent claims prohibited by 31 U.S.C. § 3729(a)(1), 31 U.S.C. § 3729(a)(2) and 31 U.S.C. § 3729(a)(3).

b. A brief narrative of the facts giving rise to the lawsuit, including a description of legal claims and defenses:

Plaintiffs' Narrative of the Case

The contract between Starkey and the United State Department of Veterans Affairs provided that Starkey sell to the VA five specific types of hearing aids at specified prices for each of the hearing aides. In addition, any options or accessories to the hearing aides would be discounted.

Starkey knew at the time that the contract was being negotiated that it was selling significant numbers of hearings aides to several companies at a significant discount. Plaintiff Dale Vosika was employed by Starkey for over 20 years, and had a close business and personal relationship with the owner, William F. Austin, and overheard numerous conversations among officers of Starkey concerning Starkey's specific intent to defraud the Veterans Affairs which provides a significant percentage of Starkey's overall sales volume.

Starkey's Narrative of the Case

Starkey denies that there was a corporate conspiracy or scheme to sell hearing aids to non-government customers on terms more favorable than those negotiated between the VA and Starkey under their 1994 Custom Hearing Aid Contract. Under the terms of the 1994 contract, as well as all applicable law, Starkey was not required to disclose every discount and price it had ever given any customer. In addition, the "Price Reduction" clause of the 1994 contract is ineffective or does not have the meaning which the Plaintiffs attach to it. Consequently, there is no merit to Plaintiffs' False Claims Act (FCA) suit.

Starkey alleges the following affirmative defenses as outlined in its Answer:

1. Plaintiffs' claims are barred due to lack of subject matter jurisdiction;

2. Plaintiffs' claims fail to state a claim upon which relief can be granted;

3. Plaintiffs' claims are based upon conduct which lacks materiality;

4. Plaintiffs' claims based upon the conduct of others are barred because Starkey is not vicariously liable for those parties' acts;

5. Plaintiffs' claims are barred by the doctrine of estoppel;

6. Plaintiffs' claims are barred by the doctrine of laches;

7. Plaintiffs' claims are barred by the Government's failure to mitigate its damages;

8. Plaintiffs' claims are barred because any actions taken by Starkey with respect to the subject matters alleged in the Complaint were undertaken in good faith and constitute lawful, proper and justified conduct, or at the very most constitute mistaken or negligent conduct, which is not actionable under 31 U.S.C. § 3729 *et seq*.;

9. Plaintiffs' claims for relief are barred because, at the very most, Starkey's alleged conduct under the contract was the result of mistake or negligence, which is not actionable under 31 U.S.C. § 3729 *et seq*. which conduct was outweighed by the contributory negligence and fault of the VA contracting officer and other personnel;

10. Plaintiffs' claims relating to the negotiation process for the contract are barred under the reasoning of *United States v. Data Translation, Inc.*, 984 F.2d 1256 (1st Cir. 1992);

11. Plaintiffs claims based upon the Price Reduction Clause are barred because the contract fails to properly and meaningfully identify a Most Favored Customer;

12. Plaintiffs' claims are barred by the statute of limitations;

13. Plaintiffs' claims are barred because their pursuit of this matter is clearly vexatious and brought primarily for purposes of harassment; and

14. Plaintiffs' claims for relief are barred because the damages and penalties they seek are above and beyond actual damages violate the Seventh and Eighth Amendments to the United States Constitution. The Court has already dismissed some of Plaintiffs' claims based upon the statute of limitations.

c. A summary of the dollar amount of each element of the alleged damages:

Based upon the information in the possession of the Plaintiffs to date, Plaintiffs have been able to identify $39,580,745.62 of false billings. Under the False Claims Act, that amount is tripled, plus penalties and interest of sales for account #G0100. Plaintiffs believe that there were sales made in other accounts with Starkey other than this account, and have requested an accounting in the Second Amended Verified Complaint.

3. Pleadings

a. A statement of whether the Complaint and all responsive pleadings have been filed and whether any party proposes to amend its pleadings:

The Complaint and all responsive pleadings have been filed. At this time, it is unknown whether any party will amend its pleadings.

b. The date by which all motions that seek to amend the pleadings or add parties will be filed:

The parties jointly propose the date of March 2, 2006, as the deadline for motions seeking to amend the pleadings and motions seeking to add parties.

c. Whether a jury trial is available under the law, and whether a jury trial has been timely demanded:

A jury trial is available and a jury trial has been timely demanded by the Plaintiffs.

4. Discovery Plan

a. Date by which the initial Rule 26(a)(1) disclosures of witnesses, documents, itemized damage computations and insurance will be completed:

The parties hereby stipulate to waive their rights to the initial disclosures available under Rule 26(a)(1).

b. Whether the parties wish to engage in any method of alternative dispute resolution following Rule 26(a)(1) disclosures but before formal discovery has commenced:

The parties do not believe that alternative dispute resolution would be beneficial at this time.

c. Whether discovery should be conducted in phases, or limited to or focused upon particular issues:

The parties do not wish to conduct discovery in phases or to limit discovery to particular issues.

d. The date by which each party shall disclose the identity of expert witnesses and their reports under Rule 26(a)(2)(A) and (B):

Plaintiffs shall disclose the identity of their expert witnesses by:	February 1, 2006
Defendant shall disclose the identity of its expert witnesses by:	March 1, 2006
Plaintiffs' experts shall serve their expert reports by:	June 1, 2006
Defendant's experts shall serve their expert reports by:	July 4, 2006
The deadline for completion of expert witness depositions is:	September 1, 2006

e. The number of interrogatories each party shall be permitted to serve:

Each party shall be permitted to serve 25 interrogatories.

f. The number of depositions (excluding depositions of expert witnesses) each party shall be permitted to take:

Each party shall be permitted to take 25 depositions.

The parties stipulate and agree that the seven-hour limit imposed by Fed. R. Civ. P. 30(d)(2) may be waived with regard to the Defendant's taking of the Plaintiffs' depositions. The parties agree that the waiver of the seven-hour limit with regard to other witnesses may be stipulated to on a witness-by-witness basis.

g. The number of expert depositions each party shall be permitted to take:

The parties do not wish to limit the number of expert depositions each party shall be permitted to take.

5. Close of Discovery and Non-Dispositive Motions

a. The date by which all discovery shall be completed and all non-dispositive motions shall be filed and served.

The parties agree that all non-expert discovery shall be completed by May 2, 2006.

The parties agree that all non-dispositive motions shall be filed and served by October 2, 2006.

6. Dispositive Motions and Trial

a. Date by which all dispositive motions shall be served and filed:

All dispositive motions shall be filed and served by December 1, 2006.

b. Date by which case will be ready for trial:

The parties agree that the case will be ready for trial on or after March 1, 2007.

c. The number of expert witnesses each party expects to call at trial:

Each party estimates that it will call between three to five experts at trial.

d. Estimated trial time (including jury selection and instructions, if applicable):

The parties anticipate that a trial would take approximately 3-4 weeks.

e. Miscellaneous:

The parties agree to be prepared for a final pretrial conference on or before February 1, 2007.

Date: 10/25/04

s/Robert J. Hajek
Robert J. Hajek, Reg. No. 39512
Warchold, Berndt & Hajek
3433 Broadway Street Northeast, Suite 110
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612-331-4211

Attorney for Plaintiffs

Date: 10/25/04

s/Janice M. Symchych
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